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No. 81-39

In the Supreme Court of the United States

OCTOBER TERM, 1980

RAYMONDE SHAMSEE, PETITIONER

v.

UNITED NATIONS JOINT STAFF PENSION FUND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the United Nations Joint Staff Pension Fund and its Secretary are immune under the Convention on the Privileges and Immunities of the United Nations of Feb. 13, 1946, 21 U.S.T. 1418, T.I.A.S. No. 6900, and the International Organizations Immunities Act, 22 U.S.C. 228 *et seq.*, from a sequestration order and subsequent enforcement orders issued by a state court.

2. Whether a state court has power to order a United States Attorney to obtain a ruling from the President of the United States as to the applicability of an immunity defense under the International Organizations Immunities Act.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Treaty and statutes involved 1

Statement 2

Argument 4

Conclusion 7

TABLE OF AUTHORITIES

Cases:

Board of Commissioners of Knox County v. *Aspinwall*, 65 U.S. (24 How.) 376 7

Broadbent v. *Organization of American States*, 628 F. 2d 37 6

International Ass'n of Machinists v. *OPEC*, 477 F. Supp. 553, aff'd, 649 F. 2d 1354 6

McClung v. *Silliman*, 19 U.S. (6 Wheat.) 598 6-7

Menon v. *Weil*, 66 Misc.2d 114, 320 N.Y.S.2d 405 5

Riggs v. *Johnson County*, 73 U.S. (6 Wall.) 166 7

Treaty and statutes:

Convention on the Privileges and Immunities of the United Nations of Feb. 13, 1946, 21 U.S.T. 1418, T.I.A.S. No. 6900 ..... 1, 3, 5

Article II, Section 2 1

Article V, Section 18 2

Page

Treaty and statutes—Continued:

Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602-1611 6

International Organizations Immunities Act, 22 U.S.C. 288 *et seq.* 3, 4, 7

22 U.S.C. 288a(b) 5

22 U.S.C. 288d(a) 5

Miscellaneous:

Exec. Order No. 9698, 11 Fed. Reg. 1809 (1946) 5

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OPINIONS BELOW

The opinion of the Court of Appeals of New York (Pet. App. A1) is reported at 53 N.Y.2d 739 and 439 N.Y.S.2d 356. The opinion of the Appellate Division of the Supreme Court of New York, Second Judicial Department (Pet. App. A2-A10), is reported at 74 App. Div.2d 357 and 428 N.Y.S.2d 33. The orders of the Supreme Court of New York, County of Queens (Pet. App. A11-A30), are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1981. The petition for a writ of certiorari was filed on July 6, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

TREATY AND STATUTES INVOLVED

Article II, Section 2 of the Convention on the Privileges and Immunities of the United Nations of Feb. 13, 1946, 21 U.S.T. 1418, 1422, T.I.A.S. No. 6900, provides:

> The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.

Article V, Section 18 of the same Convention, 21 U.S.T. 1418, 1432, provides in pertinent part:

> Officials of the United States shall:
>
> (a) be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity.

Other treaty and statutory provisions involved are reproduced at Pet. 7-10.

STATEMENT

In May 1976, petitioner obtained a support award of $200 per week against her husband, Muddassir Ali Shamsee, a Pakistani national who was then employed by the United Nations in New York (Pet. App. A3). Six months later, Mr. Shamsee retired from his United Nations job and returned to his homeland, allegedly taking with him all of the family assets, except for his accrued retirement benefits held by respondent United Nations Joint Staff Pension Fund (Fund) (*ibid.*).

To secure her support payments, petitioner filed this action in the Supreme Court of New York and obtained an order on December 30, 1976, directing sequestration of all of her husband's assets still located within the State of New York (Pet. App. A29-A30). Petitioner, seeking her husband's interest in the Pension Fund, then served a sequestration order on respondent Arthur C. Liveran, Secretary of the Fund (*id.* at A3).

Respondent Liveran declined to comply with the order, asserting immunity from legal process for himself, in his official capacity, and the Fund. The New York Supreme Court rejected respondents' claim of immunity and entered a series of orders citing them for contempt and ordering respondent Liveran arrested (Pet. App. A20, A23, A25, A28).

At the request of the United States Department of State, the United States Attorney for the Eastern District of New York entered an appearance on behalf of respondents before the New York Supreme Court. Respondents then filed a motion to stay and vacate the prior orders on the ground that they enjoyed absolute immunity from legal process under the Convention on the Privileges and Immunities of the United Nations of Feb. 13, 1946, 21 U.S.T. 1418, T.I.A.S. No. 6900, and the International Organizations Immunities Act, 22 U.S.C. 288 *et seq.* (Pet. App. A3). In support of the motions, respondents submitted two affidavits. The first, by Erik Suy, the Under-Secretary-General and Legal Counsel of the United Nations, explained that the Fund is an organ of the United Nations, regulated by the General Assembly, and that its assets are the property of the United Nations. It also stated that the Fund's Secretary is appointed by the Secretary-General of the United Nations and that both the Fund and the Secretary are immune from process (*id.* at A4). The second affidavit was by Sol Kuttner, a member of the United States Mission to the United Nations responsible for maintaining records concerning United Nations officials entitled to immunity. He attested to respondent Liveran's status as an official employed by the Fund and is thereby entitled to immunity for actions performed in his official capacity (*id.* at A4-A5).

The court granted the motion to stay, but on February 20, 1979, it denied the motion to vacate and ordered the United States Attorney to obtain a formal opinion from the

United States Department of State on the immunity issue (Pet. App. A5, A14, A19). The Department of State's Deputy Legal Adviser then submitted a letter to the court, expressing the view that respondents were entitled to immunity from the sequestration order (*id.* at A5). The court was not satisfied by this submission, however, and ordered the United States Attorney to refer the matter to the Attorney General, who in turn was to refer the issue to the President of the United States for a ruling on whether 22 U.S.C. 288 immunized these respondents from legal process (Pet. App. A12).

The Appellate Division of the Supreme Court reversed (Pet. App. A2-A10). The appellate court first held that the question of immunity under the treaties was a proper matter for the courts to decide, and therefore the court below had erred in insisting on a formal opinion from the State Department (*id.* at A6). On the issue of immunity, the appellate division held that both the Convention on the Privileges and Immunities of the United Nations and the International Organizations Immunities Act immunized respondents from the sequestration orders (*id.* at A6-A9). Finally, the court held that it was error to order the United States Attorney to obtain a ruling on immunity from the President, both because 22 U.S.C. 288 does not authorize a court to order the President to rule on an immunity question and because the trial judge lacked personal jurisdiction over the United States (Pet. App. A9-A10).

The New York Court of Appeals affirmed "for reasons stated in the opinion by * * * the Appellate Division" (Pet. App. A1).

ARGUMENT

The decision of the New York Court of Appeals that respondents enjoy absolute immunity from process in this case is a correct application of federal law and does not

conflict with any decision of any other court. Further review by this Court, therefore, is unwarranted.

1. The Convention on the Privileges and Immunities of the United Nations, 21 U.S.T. 1418, T.I.A.S. No. 6900, is unambiguous in the immunity it confers: "[T]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process * * *." This protection also extends to United Nations officials, who shall "be immune from legal process * * * (with respect to) * * * all acts performed by them in their official capacity * * *." See *Menon* v. *Weil*, 66 Misc.2d 114, 116, 320 N.Y.S.2d 405, 407 (Civ. Ct. 1971).

Similar immunity is provided by statute in the International Organizations Immunities Act, 22 U.S.C. 288a(b), which states that "[i]nternational organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments * * *."[1] As with the treaty, this immunity extends to "the officers and employees of such organizations." 22 U.S.C. 288d(a).

Petitioner does not dispute the obvious intent of these provisions to confer immunity broadly upon officials of the United Nations. Instead, she asserts (Pet. 20-23) that it was error for the Court of Appeals to conclude that these immunity provisions apply to these particular respondents without requiring a hearing. A hearing in this case, however, would have been superfluous in light of the uncontradicted affidavits filed with the New York Supreme Court. As the appellate division held (Pet. App. A7):

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[1]By Exec. Order No. 9698, 11 Fed. Reg. 1809 (1946), the President has designated the United Nations as an organization within the definition of the IOIA, thereby entitled to enjoy the immunities conferred by the Act.

> The record demonstrates with convincing clarity that the Pension Fund is an organ of the United Nations, subject to regulation by the General Assembly, and that its assets, although held separately from other United Nations property, are the property of that international organization.

Petitioner also attempts (Pet. 16-17) to avoid the plain grant of immunity contained in the treaty and statute by claiming that the activity of the Pension Fund is a "commercial activity" and therefore expressly excluded from immunity by the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602-1611. Petitioner cites no case to support her view that the administration of the assets of a pension fund for the benefit of an international organization's employees is a commercial activity within the meaning of the Act. Indeed, the contrary conclusion is much more reasonable. See *Broadbent* v. *Organization of American States*, 628 F. 2d 27, 33-35 (D.C. Cir. 1980). Moreover, Section 1611 provides that, notwithstanding the other provisions of the FSIA, "the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organization's Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to * * * a foreign state." Thus, to the extent that the FSIA applies to a case not directly involving a foreign state, see *International Ass'n of Machinists* v. *OPEC*, 477 F. Supp. 553, 560 (C.D. Cal. 1979), aff'd, 649 F. 2d 1354 (9th Cir. 1981), it expressly exempts from its coverage the assets of organizations such as the United Nations.

2. Petitioner's second argument (Pet. 24-25) that a state court has "ancillary power" to grant a writ of mandamus requiring the President of the United States to decide an issue of immunity is frivolous. It is well settled that state

courts have no power to mandamus any federal official, let alone the President. *McClung* v. *Silliman*, 19 U.S. (6 Wheat.) 598, 605 (1821). Indeed, this would seem particularly true where, as here, the United States is not even a party to the lawsuit. The cases cited by petitioner (*Riggs* v. *Johnson County*, 73 U.S. (6 Wall.) 166 (1867); *Board of Commissioners of Knox County* v. *Aspinwall*, 65 U.S. (24 How.) 376 (1860)) involved the power of federal courts to mandamus state officials and are obviously inapposite. In any event, 22 U.S.C. 288 does not authorize any court, state or federal, to demand an immunity determination from the President.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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